BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is by District Judge Sullivan (R. 90) and reported at 55 F. Supp. 687. The opinion of the Circuit Court of Appeals for the Seventh Circuit is by Circuit Judges Evans, Sparks and Kerner (Judge Sparks writing) (R. 126), and reported at 152 F. (2d) 322.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U.S.C.A., § 347, as amended, to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, entered December 18, 1945 (R. 132).

Statement of the Case.

The petitioner was the holder of preferred stock of B & K, a large motion picture exhibitor, which emerged after the first few years of depression, following the financial collapse of 1929, with about $6,000,000 of publicly-held notes and preferred stock bearing interest of 5½% and 6% and dividends of 7% (R. 25). By 1935 it was well able to obtain substantial bank loans at much lower rates and in that year it adopted and put into effect a plan for replacement of the high charge securities with low charge bank loans. Pursuant to this plan B & K borrowed sufficient money from the bank in 1935 to retire all of its outstanding 5½% and 6% notes, and borrowed fur-

ther amounts from the bank in 1936, with which it redeemed half of its 7% preferred stock. The bank interest rate was 3½% (R. 25-26). The total of loans and preferred stock remained almost constant, that is, it varied from $5,946,100 on December 30, 1933 to $5,876,660.67 on January 1, 1938 (R. 71). The refinancing and recapitalization plans approved by the Board of Directors in 1935 and 1936 showed an aggregate saving to the corporation over a ten-year period of approximately $1,000,000, assuming that the operations of the corporation continued undiminished (R. 40).

The petitioner realized a gain of $22,650.16 on the redemption of his B & K preferred stock in 1936, which would be taxable to the extent of $8,964.55 under the capital gain percentage limitations of Section 117(a) of the Revenue Act of 1936, if applicable, and would be taxable in full under the partial liquidation provisions of Section 115(c) of the Revenue Act of 1936, if applicable (R. 24). The question was raised by a suit for refund in the District Court (R. 2), the petitioner having theretofore paid additional 1936 income tax based upon full taxation of his gain and his claim for refund with respect thereto having been disallowed (R. 24).

The District Court held that the gain was subject to the percentage limitations of Section 117(a) and that the redemption price received by the petitioner did not constitute "amounts distributed in partial liquidation of a corporation" under Section 115(c), based upon its following findings of fact (among others) (R. 107-108):

> "18. The funds used by Balaban & Katz Corporation for the purchase of said preferred stock were obtained by it, pursuant to the plan approved by its directors, from The First National Bank of Chicago under an agreement increasing the bank loan of the

corporation and reducing the interest rate on said loans to 3.125%. The aim of the plan was to replace all of the outstanding obligations and preferred stock of Balaban & Katz Corporation, which aggregated approximately $6,000,000 and bore interest and dividends prior to dividends on the common stock of between 5½% and 7%, with bank loans bearing interest at 3.125%.

"19. The sale of Balaban & Katz Corporation preferred stock by plaintiff during 1936 here involved was one step in, and may not be dissociated from all of the other attendant circumstances and transactions which form a part of, an elaborate plan of refinancing or recapitalization adopted and put into effect by Balaban & Katz Corporation by eliminating notes and preferred stock which bore high rates of interest, and substituting therefor a bank loan or loans carrying a much lower rate of interest, thereby increasing the net income for the payment of dividends on the common stock; the corporate structure was in no wise changed, the total assets or total capitalization were not decreased, no steps taken toward liquidating the business in any way, the only result of the transaction being to increase the net income available for the payment of dividends on the common stock.

"20. The position of Balaban & Katz Corporation as one of the leading motion picture exhibitors in the Chicago area was not changed as a result of the recapitalization plan which was put into effect during 1935 and 1936, nor were its assets, aggregate debt and stock capitalization, or operations reduced in any way by the adoption of the plan; the acquisition of preferred stock did not involve anything like a partial liquidation, nor was it in accordance with any bona fide plan of liquidation within the ordinary meaning of that term; apart from any question of the income tax consequence of the effect upon a statutory provision of the motive or intent of taxpayer or any other person, the transaction here involved viewed in its entirety does not come within the meaning of the term 'amounts distributed in partial liquidation of a corporation' as defined in Section 115(i) of the Revenue

> Act of 1936; the ultimate goal sought to be accomplished by Balaban & Katz Corporation, without giving any consideration to the intent of the parties, was not in reality a partial liquidation of that corporation, but rather amounted to an expansion of the same."

The Circuit Court of Appeals reviewed and reversed the District Court's decision, notwithstanding the foregoing findings, on the ground that the transaction was a cancellation and redemption of preferred stock, "thereby automatically subjecting it to the treatment for tax purposes provided by § 115(c)" (R. 130).

Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the District Court's findings were subject to its review.

2. In holding that the payment received by petitioner from B & K upon the redemption of his preferred stock in pursuance of a refinancing and recapitalization plan of the corporation constituted "amounts distributed in partial liquidation of a corporation" under Section 115(c) of the Revenue Act of 1936, and not proceeds of a sale subject to the percentage limitations of Section 117(a).

ARGUMENT.

In view of the fact that the argument presented in this brief follows directly the outline stated under the heading "Reasons for Allowance of Writ" in the petition immediately preceding the brief, it is deemed unnecessary to present a summary of argument at this point.

1. **The question whether findings of the District Court are subject to more extensive review than findings of the Tax Court should be settled by this Court.**

The only question presented in this case is whether the moneys received by the petitioner on redemption of his B & K stock in 1936 constituted "amounts distributed in partial liquidation of a corporation" under Section 115(c) of the Revenue Act of 1936. Section 115(i) defines the term "amounts distributed in partial liquidation" as "complete cancellation or redemption" of stock. The position of Sections 115(c) and 115(i) in the statutory scheme and the effect of varying factual situations upon the application of these provisions are described in subdivisions 3 and 4 of this brief, showing that the application of these provisions depends upon the infinite variations in the facts from case to case in which the considerations of fact and law are inextricably intertwined. Under these circumstances, if the present case had been tried in the Tax Court of the United States, instead of the District Court, the trial court's findings would not have been subject to review.

Dobson v. *Commissioner*, 320 U. S. 489;
John Kelley Company v. *Commissioner*, ... U. S. ...., 90 L. ed. 257.

In these cases this Court has maintained its insistence

upon the finality of mixed-fact-and-law findings and of ultimate fact findings of the Tax Court with a view toward reducing the overwhelming burden of appellate tax litigation.

The development of judicial recognition of the findings of the Tax Court has been toward increasing the dignity of this tribunal to a stature equal but not superior to that of the District Courts.

At the time of its organization, the Tax Court (then known and hereinafter for convenience sometimes referred to as the Board of Tax Appeals), was an administrative tribunal of relatively little standing (compared to the Federal Courts), whose findings had only evidentiary value and were subject to trial *de novo* in the District Courts. In 1926 the statute was changed so as to eliminate trial *de novo* and limit review to errors of law. The purpose expressed by both House and Senate Committees in connection with this change was as follows (H. Rep. #1, 69th Cong., 1st sess. p. 17; to the same effect S. Rep. #52, 69th Cong., 1st sess., p. 37):

> "*Court review—Questions of fact and law.*—The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. . . . In the view of this Committee the decisions of the Board are judicial and not legislative or administrative determinations."

The same purpose was expressed in the Committee reports to the 1928 Revenue Bill (H. Rep. No. 2, 70th Cong., p. 30):

> "A recent decision by the Circuit Court of Appeals for the Seventh Circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the

> basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law."

Pursuant to these committee expressions, the Courts have striven to establish the Tax Court as a judicial body to be accorded the same dignity and standing as any other Federal trial courts. It required litigation for some time to establish the right of the Board of Tax Appeals to enforce its subpoena power (*Blair* v. *Oesterlein*, 17 F. (2d) 663 (App. D. C.), aff'd with modifications, 275 U. S. 220) to establish rules of procedure governing admission to practice (*Goldsmith* v. *U. S. Board of Tax Appeals*, 270 U. S. 117) and to establish that the rule of *res adjudicata* was applicable to Board decisions (*American S. S. Co.* v. *Wickwire Spencer Steel Co.*, 8 F. Supp. 562, 566 (D.C. N.Y.); *Nachod & United States Signal Co.* v. *Helvering*, 74 F. (2d) 164, 166 (CCA 6th); *Greenbaum* v. *United States*, 17 F. Supp. 83 (Ct. Cl.). The Board of Tax Appeals itself expressed its powers in the following language (*Garden City Feeder Co.*, 27 B.T.A. 1132, 1140):

> "the Congress was content that it had established the Board as a legislative (in contradistinction to constitutional) inferior tribunal, having judicial powers within its limited jurisdiction and capable of handing down, not merely administrative determinations, but judicial decisions."

The necessity of emphasizing the dignity bestowed upon the Board of Tax Appeals so as to conform its powers to those of the District Court is indicated by the celebrated opinion of this Court in *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220, 227:

> "An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character."

Over the years, the courts have analyzed and discussed questions of review of tax cases (whether arising in the District Court or in the Board) in identical terms, regularly giving identical effect to the findings and never raising any question whether a different rule of reviewability might be applicable:

Arising from District Court	Arising from Board of Tax Appeals
McCaughn v. *Real Estate Land Title & Trust Company*, 247 U. S. 606.	*Colorado National Bank of Denver* v. *Commissioner*, 305 U. S. 23.
(Both involving alleged gifts in contemplation of death, and both reversing Circuit Court of Appeals reversals on the ground that the question was one of fact.)	
Guggenheim v. *Rasquin*, 312 U. S. 254.	*Powers* v. *Commissioner*, 312 U. S. 259.
(Both involving rule for gift tax valuation of single premium life insurance, and both affirming Circuit Court of Appeals reversals on the ground that the question was one of law.)	

Arising from District Court	Arising from Board of Tax Appeals
Deputy v. *duPont*, 308 U. S. 488.	*Helvering* v. *Tex-Penn Oil Company*, 300 U. S. 481.

(Both holding that findings of "ultimate fact" are reviewable.)

Marsh v. *Commissioner*, 110 F. (2d) 423 (CCA 7th).

(Involving a question of trade or business similar to that involved in *Deputy* v. *duPont*, 308 U. S. 488, and reversing in express reliance upon rule of reviewability established in that case.)

Exmoor Country Club v. *United States*, 119 F. (2d) 961 (CCA 7th).

(Relied without distinction upon the rules of reviewability stated in *Bogardus* v. *Commissioner*, 302 U. S. 34, arising from Board of Tax Appeals, and *Deputy* v. *duPont*, 308 U. S. 488, arising from District Court.)

Not only the courts but the legal commentators also have emphasized the judicial character of the Board of Tax Appeals:

Griswold, *The Need for a Court of Tax Appeals*, 57 Harv. L. Rev. 1153, 1154, 1170:

". . . the Tax Court is in organization, tradition, and function a judicial body, and should be treated

> as such in any survey of judicial review in tax cases . . . That court is a court in name and in fact, and in everything else except the letter of the statute and the Committee Reports. It acts judicially, and has a fine record in acting judicially. It is not a policy formulating and enforcing agency. It sits impartially between the Commissioner and the taxpayer."

Eisenstein, *Some Iconoclastic Reflections on Tax Administration,* 58 Harv. L. Rev. 477, 541-42:

> ". . . the Tax Court has been and still is a specialized tribunal passing upon controversies in the traditional manner of the judiciary. If the concept of administration includes the authoritative formulation of subsidiary rules by a rule-making agency, the Tax Court is no more administrative in character than a district court."

Stevens, *Legal Evidence before the Board of Tax Appeals,* 6 National Tax Magazine 459, 461:

> ". . . the United States Board of Tax Appeals is not a fact finding body, not a governmental bureau, not another commission, not a board of arbitrators. It is a court."

Thus we find that at the present time, after years of effort on the part of the Congress, the courts (including the Tax Court itself), the Treasury Department, and taxpayers, the Tax Court has been established in a position coordinate and comparable in all respects with the District Courts. In the tax field the problems presented are identical, the manner of presentation is identical, the forms and court procedures are virtually identical, the precedents and rules to be applied are identical, and the goals to be accomplished are substantially identical. As far as the Circuit Courts of Appeals are concerned, the appellate presentation is identical whether arising from the District Court or from the Tax

Court—that is, the issues, parties, records, arguments and precedents appear in identical fashion both as to form and as to substance. Under these circumstances the creation of divergent rules of appellate reviewability would create a critical confusion and ambiguity in the administration of justice in the tax field. This is particularly true because of the essential and unavoidable vagueness and ambiguity to which this Court has repeatedly referred in drawing the fine line between a reviewable finding and a non-reviewable finding. One of the controlling considerations which have moved this Court to adopt the rule enunciated in the *Dobson* and *Kelley* cases is the need for reduction of the disproportionate burden of appellate tax litigation. It is submitted that the volume of such litigation would be increased rather than diminished if the eleven different Courts of Appeals were required to interpret and apply two different sets of principles of appellate review to the same types of cases, presented in the same way but arising out of different trial courts. The inevitable contrast between the points of view expressed by the Circuit Courts of Appeals under two such sets of principles would tend to require the parties to seek review in the Circuit Court of Appeals in every case where the least doubt exists.

Apart from the inequality of making the taxpayer's access to appellate review depend upon whether or not he is financially able to pay the tax claimed and seek refund, the practical effect of such divergent rules would be felt at every step in the administration of the Federal tax law. The taxpayer's natural desire for another day in court, reinforced by the fact that successful refund claims carry interest at six per cent, substantially above the current market interest rate, would tend to divert a substantial and possibly preponderant portion of the tax

litigation to the District Courts and away from the Tax Court, which this Court wishes to establish as the primary tax tribunal. This would nullify to a substantial extent the endeavor of this Court to diminish the volume of tax appeals. The problem has been noted by Mr. Randolph Paul in his article, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 Harv. L. Rev. 753, 808:

> ". . . There is no evidence that the drafters of Section 1141(c)(1) contemplated, as the *Dobson* opinion seems to imply, a special set of fact-law concepts to govern petitions to review Tax Court decisions. A question of fact is a question of fact regardless of the trial forum. In emphasizing this facet of review, no aspersions are cast upon either the special administrative procedure devised by Congress or the Tax Court's skill in dissecting tax problems. That court, as previously indicated, was established in order to bring a particularly informed judgment to the solution of tax controversies entangled in 'complicated and technical facts'. But this purpose does not invite any assumption that what is law in the other courts manages to be fact in the Tax Court. Taxpayers are simply given the option of placing their grievances before a specially constituted body or resorting to more traditional channels of relief. Hence, any shifting distinctions between law and fact which depend upon the character of the trial court are exclusively judicial importations, and whether or not they are justified as a matter of policy is entirely irrelevant within the existing statutory framework. In any event, a dual set of competing concepts can only land the circuit courts, as well as the Supreme Court, in a morass of appellate subtleties."

In any event, whether or not this Court intends to apply the *Dobson* rule to findings of the District Court, a critical area of uncertainty remains until the determination is officially made by this Court. Upon taxpayers

and government alike, as well as to the Circuit Courts of Appeals and this Court, a disproportionate weight of appellate tax litigation can be expected to continue so long as the issue remains unsettled. It is a well established rule of this Court that certiorari will be granted where necessary in order to determine questions which affect the efficient administration of the tax laws.

District of Columbia v. *Pace,* 320 U. S. 698, 700.
Dobson v. *Commissioner,* 320 U. S. 489, 492.

2. The decision of the Court below to review the District Court findings is in conflict with the decisions of other Circuit Courts.

The confusion as to the scope of appellate review of District Court findings in tax cases is already creating a conflict in the circuits. In *Blumenthal Print Works* v. *United States,* 141 F. (2d) 211, 212, the Fifth Circuit Court of Appeals specifically relied upon the *Dobson* case in refusing to review the findings of the District Court.

Other Circuit Courts have also taken the position that the findings of the Tax Court are on a parity with findings of the District Courts. In *Commissioner* v. *Liberty Bank & Trust Co.,* 59 F. (2d) 320, 323 (C.C.A. 6th) the Court stated:

> "While it [the Board] is not a court but is an executive or administrative board, it nevertheless exercises 'appellate powers which are judicial in character' . . . In passing upon matters such as are involved in this case, the Board exercises functions similar to those exercised by a trial court in a law case without a jury. *Phillips* v. *Commissioner,* 283 U. S. 589, 599 . . ."

In *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. (2d) 906, 908 (C.C.A. 4th), the Court stated:

> "Although the Supreme Court has indicated that the Board of Tax Appeals is not a court (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716), its work is of a judicial character (*Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220), . . . and we are of the opinion that the rule governing appeals from courts should prevail as to appeals from the decision of the Board."

To the contrary, in *Lothair S. Kohnstamm* v. *Pedrick*, 152 F. (2d) ..., 46-1 U.S.T.C. par. 9122 (12/28/45), the Circuit Court of Appeals for the Second Circuit directly reversed a decision of the District Court without remanding, in contrast to its prior decision on substantially identical facts arising from the Tax Court, in which it refused to pass upon the facts and remanded for further action by the Tax Court.

It is respectfully submitted that such examples will multiply in the near future unless the question is settled by this Court.

3. In holding that the definition of partial liquidation was "automatically" applicable under its literal terms without reference to the surrounding facts, the decision below is in apparent conflict with decisions of this Court relating to the construction of definitions in the tax law.

Even without reference to the inconsistency in the application of Section 115(c) by the court below, referred to in the last paragraph of this subdivision, the applicable decisions of this Court clearly require that a definition in the tax law such as that involved in Section 115(i), as applied to Section 115(c), must be interpreted in the

light of the congressional intent and the ordinary understanding of the term defined. The decisions follow the same general principle stated by Mr. Justice Holmes in *Guy* v. *Donald*, 203 U. S. 399, 406:

> "The questions certified very properly go beyond the question of the existence of a partnership. As long as the matter to be considered is debated in artificial terms, there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied."

Almost the precise question of whether to apply a tax definition mechanically was involved in *Gregory* v. *Helvering*, 294 U. S. 465, in which the transaction presented to this Court was clearly and specifically within the literal terms of the definition of "reorganization" in the revenue statute. This Court refused to treat the transaction as a reorganization, on the ground that the transaction was not *in substance* a business reorganization and that literal compliance with the statutory forms was not sufficient.

Similarly, in *Pinellas Ice & Cold Storage Company* v. *Commissioner*, 287 U. S. 462, the transaction in question was in form within the literal terms of the reorganization definition and this Court held that the substance of the definition was not present and the transaction would not be treated as a reorganization.

In *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126, this Court was concerned with the term "taxable year", which was specifically defined in the applicable revenue act. In applying this definition, this Court stated the rule of construction as follows:

> "But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, *however precise its language*, cannot be ascertained if it be considered apart from related

> sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part." (italics supplied)

In these cases this Court established the rule that such definitions are not "automatically" applicable without consideration of the surrounding circumstances and their relationship to the scope of the statute and the substantive meaning of the term defined. In regarding itself as bound by the literal terms of the statute, the Circuit Court of Appeals, below, has run counter to the explicit rule of this Court.

It is appropriate to state that the Circuit Court of Appeals' reversal of the District Court, herein, was based upon an erroneous misconception of the binding effect of the statute upon the courts. Under similar circumstances in *Commissioner* v. *Heininger,* 320 U. S. 467, 475, this Court approved the reversal of a Board of Tax Appeals decision even though the same decision would have been affirmed if it had been based upon "an independent exercise of judgment rather than upon a mistaken conviction that denial was required as a matter of law."

As a matter of fact even the literal language of the statute applied herein does not require or, it is submitted, permit the interpretation adopted by the Circuit Court of Appeals. Section 115(c) of the Revenue Act of 1936 specifically limits its application to "amounts distributed in partial liquidation *of a corporation*", the Court below has limited its analysis of the issue presented to the definition of "distributions in partial liquidation" (excluding the words "of a corporation") in Section 115(i). Inasmuch as Section 115(i) defines distributions in partial liquidation generally as meaning in cancellation or redemption of stock and inasmuch as the transaction

herein involved, when plucked out of the integrated plan of which it was a part, was formally a redemption, the Court below held that the 100% taxability prescribed by Section 115(c) for partial liquidations "of a corporation" was "automatically" applicable. The conclusion of the Court below was that a partial liquidation occurs under Section 115(c) wherever stock is redeemed, even though the corporation is not being liquidated in any degree. This appears to be directly inconsistent with the inclusion of the words "of a corporation" in Section 115(c) and the inconsistency is not explained in the opinion of the Court below.

4. In holding that a stock redemption is "automatically" a distribution "in partial liquidation of a corporation," without reference to the surrounding circumstances, the decision below is in conflict with decisions of several other Circuit Courts of Appeals in the same matter.

It is not considered appropriate herein to dwell at length upon the history of the definition of "distributions in partial liquidation" and the subsequent use of that definition for penalty taxation in Section 115(c), so as to show what prompted the District Court to hold that the facts here presented did not involve a distribution "in partial liquidation of a corporation". The purpose of this brief is to show the importance of the questions involved and the conflict between the decision below and applicable decisions of this Court and other Circuit Courts of Appeals so as to indicate the desirability of review by this Court. If the petition for certiorari is granted, petitioner will present to the Court a complete discussion of the legal and factual considerations which impelled the District Court to the decision entered.

Basically the District Court decision was that the

preferred stock redemption here involved was an integral step in an elaborate refinancing or recapitalization plan and could not be viewed separately, as a partial liquidation of the corporation, where the plan as a whole involved no characteristics of retrenchment of corporate business or of distribution of idle corporate assets, and on the contrary relied upon a substitution of one type of securities for another in order to stimulate and expand the corporation. A classical statement of the meaning of partial liquidation is contained in the opinion of the Board of Tax Appeals in *Mabel I. Wilcox*, 43 B.T.A. 931, 939-40, aff'd 137 F. (2d) 136 (C.C.A. 9th):

> "The crux of our question is, as the petitioners submit, whether the distribution made in 1934 was made in partial liquidation of the corporation, so that the amounts distributed should be treated 'as in part or full payment in exchange for the stock' under the provisions of subsection (c) above.
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> * * * * *
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> What is meant by the word 'liquidation' as used in subsections (c) and (i) above?
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> In *W. E. Guild*, 19 B.T.A. 1186, 1202, we said:
>
> > 'The word "liquidation" when applied to a partnership or company has a general meaning, well recognized by textwriters and courts, as the operation of winding up of its affairs by realizing its assets, paying its debts and appropriating the amount of profit or loss. 37 Corpus Juris 1265; *Assets Realization Co.* v. *Howard*, 127 N.Y.S. 798; *Gibson* v. *American Rwy. Express Co.*, 195 Iowa 1126, 193 N. W. 274; *Rohr* v. *Stanton Trust & Savings Bank*, 76 Mont. 248, 245 Pac. 947; *Gilna* v. *Barker*, 78 Mont. 357, 254 Pac. 174; *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 107 N. E. 644; *in Re Union Bank of Brooklyn*, 161 N. Y. S. 29.'
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> In *Hellman* v. *Helvering*, 68 Fed. (2d) 763, it was said that:
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> > '* * * In its generally accepted meaning a dividend in liquidation means an act or an

> operation in winding up the affairs of a firm or corporation, a settling with its debtors and creditors, and an appropriation and distribution to its stockholders ratably of the amount of profit and loss. * * *'
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> See also *Rheinstrom* v. *Conner,* 33 Fed. Supp. 917; *Northwest Bancorporation* v. *Commissioner,* 88 Fed. (2d) 293. In *Tate* v. *Commissioner,* 97 Fed. (2d) 658, it was said that: 'Whether a dividend is a "distribution in liquidation" is a question of fact, and depends upon the intent of the directors of the corporation.' "

A recent careful statement of what partial liquidation is intended to mean in the statute was made by the Court of Claims in the case of *Trust Company of Georgia* v. *United States,* 60 F. Supp. 470, 479:

> "One form in which earnings might be distributed in lieu of a dividend is by partial liquidation of the corporation, as in a case where the corporation has accumulated more assets than it needs to carry on its business, or where it wishes to curtail its activities."

The respondent has relied throughout these proceedings upon certain opinions of the Board of Tax Appeals and the courts indicating that a partial liquidation of a corporation may occur without a direct reduction of the corporation's volume of business. These cases fall into one of two classes, namely, (a) those cases in which the distribution was alleged to have been an ordinary dividend and the discussion in the opinion was directed toward the distinction between capital distributions (typified by a partial liquidation) and ordinary distributions of profits; the holdings in such cases were merely that the absence of a reduction in business volume did not necessarily characterize the distribution as an ordinary dividend; (b) those cases in which the liquidation

was with respect to idle corporate assets not needed in the business, in which the courts have held that the corporation liquidated part of itself by disposing of the idle assets even though the regular business volume was not affected.

None of these cases has any pertinence to a case in which a capital exchange, though cast in the form of a redemption, is merely one step in an integrated series of transactions which neither reduced the corporate business nor disposed of idle corporate assets. All of the courts to which the question has been presented have held that a stock cancellation or redemption may not be characterized as a partial liquidation where the surrounding facts (as determined by the appropriate trier of facts) show an integrated plan which is not a plan of liquidation.

Commissioner v. *Whitaker*, 101 F. (2d) 640 (CCA 1st).

Commissioner v. *Kolb*, 100 F. (2d) 920 (CCA 9th).

Helvering v. *Schoellkopf*, 100 F. (2d) 415 (CCA 2d).

Helvering v. *Leary*, 93 F. (2d) 826 (CCA 4th).

Gutbro Holding Company v. *Commissioner*, 138 F. (2d) 16 (CCA 2d).

All of the foregoing decisions have emphasized that the characterization of a stock redemption as a partial liquidation or not a partial liquidation is a question of fact to be answered by close scrutiny of the attendant circumstances by the trial court. The same position was adopted in approval of the District Court decision herein by another District Court in the case of *Harter Bank & Trust Co.* v. *Gentsch*, 60 F. Supp. 400, 401 (D. C. Ohio).

The decision of the Circuit Court of Appeals herein is the first decision in which the automatic interpretation

of the definition of partial liquidation has been upheld by a Circuit Court of Appeals by plucking a redemption out of its context. The decision below introduces a new element of uncertainty and conflict between the circuits as to the tax effects of integrated recapitalization and refinancing plans, which should be resolved by appropriate decision of this Court.

All of which is respectfully submitted.

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